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Nos. 95 and 103

In the Supreme Court of the United States

OCTOBER TERM, 1945

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND GEORGE M. HARRISON, PETITIONERS

v.

DUQUESNE WAREHOUSE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

DUQUESNE WAREHOUSE COMPANY, PETITIONER

v.

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RAILROAD RETIREMENT BOARD

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BRIEF FOR THE RAILROAD RETIREMENT BOARD

OPINIONS BELOW

In No. 95 the findings and opinions of the Railroad Retirement Board are printed at R. 19–57.

The opinion of the District Court (R. 822–290)[1] is reported in 56 F. Supp. 87. The opinions of the Circuit Court of Appeals (R. 302–323) are reported in 148 F. 2d 473. In No. 103, the findings and opinions of the Board are printed at No. 103, R. 36–61. The opinion of the District Court (No. 103, R. 71–73) is not reported, and the opinion of the Court of Appeals (No. 103, R. 81–86) is reported in 149 F. 2d 507.

JURISDICTION

The judgment of the Circuit Court of Appeals in No. 95 was entered on April 24, 1945 (R. 328). A petition for rehearing was denied the preceding day, April 23, 1945 (R. 327). The petition for a writ of certiorari was filed May 28, 1945, and granted June 11, 1945 (R. 329). The judgment of the Court of Appeals for the District of Columbia in No. 103 was entered on May 14, 1945. The petition for a writ of certiorari was filed June 1, 1945 and granted June 11, 1945 (No. 103, R. 87, 88). The jurisdiction of this Court in both cases is based upon the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

[1] Except where otherwise indicated, record references are to the record in No. 95. The records before the Retirement Board in the two cases were, by stipulation, identical, and the parties have agreed that they be printed only in the record in No. 95.

QUESTION PRESENTED

Whether a warehouse company wholly owned by the Pennsylvania Railroad Company and engaged primarily in storage for shippers and consignees of goods transported or to be transported on the Pennsylvania and also in the salvaging of over freight and damaged freight for the Pennsylvania is a company owned by a carrier and "which operates any equipment or facility or performs any service * * * in connection with the transportation of * * * property by railroad, or the receipt, delivery, * * * transfer in transit, storage, or handling of property transported by railroad" within the meaning of Section 1 (a) of the Railroad Retirement Act of 1937 and the identical language of the Railroad Unemployment Insurance Act.

STATUTES INVOLVED

The statutes involved are the Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U. S. C. Secs. 228a–228s, and the Railroad Unemployment Insurance Act, 52 Stat. 1094, as amended, 45 U. S. C. Sec. 351, *et seq.* The pertinent provision in Sec. 1 (a) of each statute, is quoted immediately below. Other provisions of the Acts are set forth in the Appendix, *infra*, pp. 70–79.

Section 1. For the purposes of this Act—

(a) The term "employer" means any carrier (as defined in subsection (m) of

this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: * * *

STATEMENT

No. 95: The primary function of the Railroad Retirement Board under the Railroad Retirement Act is to adjudicate claims of eligible employees for annuity, pension or death benefits. The eligibility of an employee for such benefits is based on service to entities which are included within the definition of "employer" in the Act. Section 1 (b), 45 U. S. C. Sec. 228a (b) (*infra*, p. 71). Following applications for such benefits by employees of the Duquesne Warehouse Company, the Board was faced with the initial question whether Duquesne was such an employer. In a proceeding to determine this question, the Board held a

hearing[2] and found that Duquesne was an "employer" under the Act. Contending that it was not properly held to be an "employer," Duquesne thereupon brought suit in the United States District Court for the Southern District of New York to compel the Board to set aside its order, pursuant to the review provisions contained in Section 11 of the Act (45 U. S. C. Sec. 228k *infra*, p. 72) (R. 3–11). The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and the president of the Brotherhood, G. M. Harrison, were permitted to intervene as defendants (R. 277–278). The District Court granted summary judgment for Duquesne (R. 292–293), and the United States Circuit Court of Appeals for the Second Circuit affirmed, Judge Frank dissenting (R. 302–323). Upon petition by the Board, this Court brought the case here by certiorari.

No. 103: Under the Railroad Unemployment Insurance Act, the Board adjudicates claims of eligible employees for unemployment insurance payments. Eligibility for such payments is governed by the same criteria as under the Railroad

[2] The record before the Board at the hearing consisted of questionnaires, affidavits and statements filed by Duquesne. The parties did not request that oral testimony be taken, and agreed that the case should be submitted on the record indicated (R. 249–250, 264). The case was argued orally before the Board by Duquesne and by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (R. 20).

Retirement Act—whether the employee rendered service for an "employer" as defined in the Act. (Sec. 1 (d) 45 U. S. C. 351 (d) *infra*, p. 76). An award of benefits to employees of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act being in question, the Board instituted a similar proceeding thereunder to determine whether the Company was an "employer." The Board made identical findings on the same record, determining Duquesne to be an "employer" under that Act (No. 103, R. 36–43). Pursuant to Section 5 (c), (f) of the Unemployment Insurance Act (45 U. S. C. Sec. 355 (c), (f) *infra* pp. 77–79) the company brought suit in the United States District Court for the District of Columbia to set aside that order (No. 103, R. 1), and the Brotherhood again intervened in support of the order (No. 103, R. 65–70). The District Court granted Duquesne's motion for summary judgment (No. 103, R. 71–73), but the United States Court of Appeals for the District of Columbia reversed (No. 103, R. 81–86). This Court granted a writ of certiorari upon Duquesne's application therefor.

The facts disclosed by the records before the Board (which are printed in full only in the Record in No. 95, R. 18–277), and as found by the Board (R. 19–45), may be summarized as follows:

The Duquesne Warehouse Company is a Pennsylvania corporation all of whose stock is owned by the Pennsylvania Railroad Company, a carrier

by railroad subject to part I of the Interstate Commerce Act; the principal officers of Duquesne are officers of Pennsylvania (R. 58–61, 108, 133). Duquesne's charter provides that it was "formed for the purpose of conducting a storage and warehouse business" (R. 67). It has been engaged in receiving, delivering, storing, and other handling of goods transported over the lines of Pennsylvania (R. 61–64, 108–110, 133–138). In the performance of these services, Duquesne operates two warehouses in buildings owned and leased to it by Pennsylvania, one in Pittsburgh and the other in East Liberty, within the Pittsburgh city limits (R. 108–109, 133). Each building is on a rail siding of Pennsylvania, and part of the ground floor of each is retained by Pennsylvania and officially designated as its "freight agency" or station (R. 108, 133). Parts of the Pittsburgh building are sublet by Duquesne to independent manufacturing concerns (R. 137).

At the East Liberty Warehouse, Duquesne handles and stores only one commodity, carload sugar, all of which comes in and goes out over Pennsylvania's rails (R. 61, 108, 134). The sugar is handled by Duquesne under storage-in-transit privileges covered by railroad tariffs filed by Pennsylvania with the Interstate Commerce Commission (R. 61–62, 135–136). Incoming shipments are consigned to the owner care of Duquesne, the route being designated as "Penn RR—For Stge in

"Transit"; and outgoing shipments are consigned to the owner, the bill of lading having a transit record number and being marked "accorded transit privilege at East Liberty, Pa." (R. 134, 170, 171). Duquesne unloads the sugar from Pennsylvania's railroad cars upon their arrival and reloads the sugar into Pennsylvania's railroad cars upon their departure (R. 61, 109, 134, 135).[3]

At its Pittsburgh warehouse, Duquesne handles freight which has come in, or is destined for movement, over Pennsylvania's rails, or which has both come in and is going out over Pennsylvania's rails (R. 108). The commodities handled at that place are diverse in character and are hauled in both carload and less-than-carload form; approximately 95 per cent come in by rail, and approximately 60 per cent leave by rail (R. 108, 136–137, 83–84). The services performed by Duquesne at the Pittsburgh warehouse are similar to those at East Liberty in so far as carload freight is concerned (R. 62, 109–110, 133–134, 136–137). Duquesne loads and unloads the railroad cars as they arrive at and depart from its platform, stores the railroad-transported goods, and performs other handling services in connection with the receipt and delivery of such goods. Duquesne charges the owner for the performance of these services. As to the less-

[3] The governing tariff requires that carload freight be loaded and unloaded by the owner, and Duquesne performs these functions on behalf of the owner (R. 134–135).

than-carload freight, Duquesne stores it and also performs the handling services involved in delivering it to and receiving it from Pennsylvania's platform. In the case of incoming less-than-carload shipments, the freight is unloaded by Pennsylvania from the cars to its platform and is delivered to and received by Duquesne on such platforms. In the case of outgoing less-than-carload shipments, Duquesne delivers the freight on Pennsylvania's platform; Pennsylvania then issues its bill of lading, loads the freight into the cars, and moves them out (R. 62, 109, 136–137).

While the freight is in Duquesne's warehouse it is under the control and direction of the owner, and the responsibility of Duquesne to the owner is that of warehouseman (R. 135). Duquesne performs services such as storing, packing and assembling as required by the owner (R. 135).

During the period between August 1937 and May 1938, Duquesne also performed unloading, storing and reloading services and other transit services at Erie, Pennsylvania, in connection with carload shipments of newsprint paper entitled to storage-in-transit privileges under Pennsylvania's tariffs. These services were similar to those performed by Duquesne at East Liberty (R. 61–62, 138).

Since 1922 Duquesne has been a party to "salvage freight" agreements with Pennsylvania whereby Pennsylvania turns over to Duquesne

for resale and disposal over and damaged freight which has been refused or unclaimed by the owner (R. 62–63, 108, 137, 85–89, 179–185). For this service Duquesne retains 10 per cent of the gross proceeds plus certain costs and turns the balance over to Pennsylvania. The contracts require Duquesne to deliver all such freight to Pennsylvania or to the true owner, if his identity is ascertained or if he requests delivery before the goods are sold (R. 86–87, 101).

The employees of Duquesne are hired and discharged by it and paid from its own funds, and are supervised not by Pennsylvania but by Duquesne's supervisor. The employees are not entitled to become members of a relief department or a loan association composed of Pennsylvania employees (R. 137). They are, however, affiliated with and represented for purposes of collective bargaining by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, a railway labor organization, and their working conditions are governed by contract between the Brotherhood and Duquesne (R. 25, 89–99). Duquesne has paid and is paying taxes under the Federal Social Security Act and State Unemployment Compensation law rather than under the Railroad Retirement law (R. 138).

From the above facts the Board found that (R. 21, 25):

> Duquesne's operations are * * * intimately and integrally related to Pennsylvania's railroad transportation. * * *
>
> The two warehouses operated by Duquesne —one in Pittsburgh proper and the other at East Liberty in Pittsburgh—have been valuable links in the chain of Pennsylvania's railroad transportation. * * *
>
> * * * * * *
>
> Duquesne's operations are * * * directly related, functionally and economically, to the performance of the transportation obligation which Pennsylvania has undertaken as a common carrier by railroad, and to the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.

The Board concluded that Duquesne was an employer within the meaning of Section 1 (a) of the Railroad Retirement Act because it was (R. 25)—

> * * * engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.

The Second Circuit Court of Appeals set this determination aside (No. 95), but the Court of Appeals for the District of Columbia upheld an

identical determination of the Board under the Railroad Unemployment Insurance Act (No. 103). Both cases are before this Court on writs of certiorari.[1]

SUMMARY OF ARGUMENT

The Railroad Retirement Act applies to employees of carriers, and of subsidiaries of carriers engaged in performing services "in connection with the transportation * * * of property by railroad" or "in connection with" the "receipt, delivery * * * storage, or handling of property transported by railroad." Persons performing the services here involved would undoubtedly be covered if employed by Pennsylvania. The question is whether employees performing the same services for Pennsylvania's subsidiary are covered by the statutory definition.

I

A. The Board has construed the above language as reaching subsidiaries performing services "reasonably directly related, functionally and economically, to the performance" of a railroad's common carrier obligation, irrespective of whether

[1] This brief is designated as the Government's main brief for both No. 95, arising under the Railroad Retirement Act, and No. 103, arising under the Railroad Unemployment Insurance Act. When reference is made herein only to the Retirement Act, the Court may assume that the two statutes are identical, as they are in the provisions principally involved.

such services constitute transportation within the meaning of the Interstate Commerce Act. The Board's construction of the Act is supported by the statutory language, which, though obviously designed to cover only services having some relation to railroading, is on its face not susceptible of the limitation to mere "transportation" which Duquesne seeks to read into it. Such a construction would make most of the words of the statute's definition surplusage. This is even more true of the suggestion that the definition only reaches transportation services which a carrier is obligated to perform.

B. The legislative history of the Act does not disclose any Congressional intention inconsistent with the statute's language. It was undoubtedly intended that the Act have the same general scope as the Interstate Commerce Act, and there are some remarks in committee hearings which suggest adoption of the test of "transportation" embodied in the Commerce Act. The same speakers, however, manifested a specific intention that railroad subsidiaries performing certain functions which would not have been reached by the Commerce Act definition be covered, and similar statements were made by sponsors of the Act in committee reports and on the floor of Congress. The legislative materials thus indicate that as to certain peripheral activities the Retirement Act was not intended to have the same meaning as the defi-

nition of transportation in the Interstate Commerce Act.

In addition the authorities under the Interstate Commerce Act itself are not entirely consistent as to what is included within the term "transportation", the decisions seemingly varying with the nature of the problems raised. These authorities accordingly do not present a sufficiently clear pattern to require deviation from the test supported by the statutory language.

Even if the Interstate Commerce Act definition were regarded as controlling, the legislative history of the definition in the Retirement Act indicates at the very least that Congress meant to reach those activities of railroad subsidiaries which would have been transportation services if performed by the railroad companies themselves. The test is not whether a subsidiary would itself be subject to the Interstate Commerce Act definition.

II

If the Board did not apply improper criteria in reaching its decision, its ruling should be accepted as long as not arbitrary or unsupported by substantial evidence or, as it has been more precisely stated, "when there is found to be a rational basis for the conclusions."

A. The Board's finding that Duquesne is closely related functionally and economically to Pennsyl-

vania is adequately supported. The activities of a warehouse, located on a railroad siding in a building used by the railroad as a freight station, in loading and unloading and storing (including storage in transit) freight almost all of which is transported by the railroad are clearly advantageous to the railroad and directly connected with its normal functions. Moreover, the salvage freight agreement whereby Duquesne disposes of Pennsylvania's unclaimed and damaged freight manifests the close economic relationship between Duquesne and Pennsylvania.

B. Even if the test be that of "transportation" under the Interstate Commerce Act, numerous cases hold that loading and unloading and storage, including storage in transit, by a carrier constitute transportation. This would suffice to subject such services to the Retirement Act when performed by a carrier subsidiary. Although the authorities are not uniform, they certainly provide a reasonable basis for the Board's conclusion that at least a substantial part of Duquesne's activities would have constituted transportation if undertaken by Pennsylvania directly, and that accordingly the performance of such services by Pennsylvania's subsidiary comes within the Retirement Act.

ARGUMENT

Introductory Statement

The Railroad Retirement Act and the Railroad Unemployment Insurance Act apply to carriers by railroad subject to Part I of the Interstate Commerce Act, and to any company (1) which is owned or controlled by any such carrier and (2) "which operates any equipment or facility or performs any services (except trucking service, casual service, and casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad."[5]

If the Pennsylvania Railroad, which is admittedly a carrier subject to Part I of the Interstate Commerce Act, performed the services involved in this case, its employees would unquestionably be covered by the statutes.[6] The employees of subsidiaries of carriers are also covered if they perform the services described in the second part of the above definition. Duquesne, which is not a "carrier" subject to Part I of the Commerce

[5] Railroad Retirement Act, Section 1 (a), (m), 45 U. S. C. sec. 228a (a), (m); Railroad Unemployment Insurance Act, Section 1 (a), (b), (d), 45 U. S. C. sec. 351 (a), (b), (d).

[6] Railroad Retirement Act, Section 1 (a), (b), (m), 45 U. S. C. sec. 228a (a), (b), (m); Railroad Unemployment Insurance Act, Section 1 (a), (b), (d), 45 U. S. C. sec. 351 (a), (b), (d).

Act, is concededly wholly owned and controlled by Pennsylvania. The sole question in these cases is whether the Board could properly find Duquesne to be a company performing any of the described services.

If the statutory words are given their ordinary meaning, the definition fits Duquesne in five different respects. Duquesne performs services in connection with (1) receipt, (2) delivery, (3) storage, and (4) handling, of property transported by railroad, and, also, more generally, (5) in connection with transportation of property by railroad. Indeed, in so far as the first four of these expressions are concerned, it is unnecessary to determine the precise scope of the phrase "in connection with", since respondent actually receives, delivers, stores and handles goods transported by railroad and thus obviously perform services connected with such receipt, delivery, storage, and handling.

Although the Court of Appeals for the District of Columbia unanimously held that the words of the statute should be given their ordinary meaning (No. 103, R. 83–84), the majority of the Second Circuit concluded that as a matter of law the statutory definitions denote only "transit and cover acts done only by or for the carrier while its obligations persist" (R. 305). Duquesne also has argued that the definition applies only to services performed "while the property is being

transported in railroad service" (Appellee's Br., App. D. C., p. 9).

The Retirement Board, in rejecting these contentions, has construed the services described in the definition as being those "reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad." This administrative interpretation of the statute has been embodied in regulations[7] and Board decisions[8] which in themselves are an important factor in determining the statute's meaning. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140.[9] It is our position that the Board has not erred as a matter of law

[7] 20 C. F. R. 202.7; 20 C. F. R. Cum. Supp. 301.4.

[8] See Railroad Retirement Board Law Bulletin No. 2, December 1940, which collects illustrative decisions of the Board up to that date with respect to companies performing services in connection with railroad transportation.

[9] The Railroad Retirement Board, which is charged with the responsibility of administering and, in the first instance, interpreting the Retirement Act, is the expert body specializing in and familiar with the railroad field. The Social Security Act covers employees not subject to the Retirement Act. We believe that in these circumstances the reasons underlying judicial respect for administrative interpretations of the Retirement Act apply to the Retirement Board to a much greater extent than to the Social Security Board.

in giving the statute the above construction, and that, assuming no error of law in construing the Act, the Board's decision is binding upon the courts since not without warrant in the record or a reasonable basis in law. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131; *Gray* v. *Powell*, 314 U. S. 402.

The Board also held (R. 29–31) that even assuming that Section 1 (a) of the Retirement Act has no broader meaning than "transportation" as defined in Section 1 (3) of the Interstate Commerce Act, the result would be the same. For Duquesne is engaged in loading, unloading and storage, including storage in transit, of property transported by railroad, and these operations have been held to constitute transportation under the Interstate Commerce Act. In this connection it should be noted that the question is not whether the performance of these services by a railroad-controlled subsidiary would constitute "transportation" within the meaning of the Interstate Commerce Act. It can be assumed, *arguendo*, that they would not, since Duquesne is not a carrier subject to that Act. But we think that both the language and history of the Retirement Act demonstrate that if performance of a service by a carrier would come within the definition of transportation in the Commerce Act, performance of the same service by a carrier-controlled subsidiary would come within the Retirement Act.

The Board's decision that Duquesne is subject to the Retirement Act must be upheld if the Board is correct on either of the two alternative theories on which its ruling was based.[10]

This brief is presented on behalf of the Railroad Retirement Board, which is charged with the duty of administering the Railroad Retirement and Railroad Unemployment Insurance Acts. The Bureau of Internal Revenue, which

[10] The American Warehousemen's Association has filed a brief as *amicus curiae* in which it foresees serious consequences for the independent warehousing industry if the Board's decision is upheld (Br., pp. 4–7). We do not see how independent warehousing companies will be harmed if railroad-affiliated warehouses alone are brought under the Retirement Act and related legislation, under which, at present, they have to pay higher taxes than their independent competitors. The Association's primary fear seems to be that the Board's decision may have the effect of holding the independent warehousemen to be engaged in "common carrier transportation service" subject to the regulatory provisions of the Interstate Commerce Act, and of depriving them of the protection against discriminatory railroad practices accorded by such cases as *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507. The Board's opinion on its face and the arguments herein presented on behalf of the Board can hardly be thought to have any such effects. As we show, the Board interprets the provisions of the Act for the coverage of railroad-controlled subsidiaries as *not* embodying the definition of transportation in the Interstate Commerce Act. And even when it assumes the contrary, the Board recognizes that the definition of transportation has been and must be read in the various contexts and purposes of the several statutory provisions, so that no principles presently established under other laws would be overturned by bringing carrier-controlled warehouses under the Retirement Act and related legislation.

enforces both the Carriers Taxing Act and the taxing provisions of the Social Security Act, is in accord with the position of the Retirement Board. The Social Security Board, however, has requested the Solicitor General to advise the Court that it does not agree with the interpretation of the Retirement Board, and that it has not followed this interpretation in administering the Social Security Act, which exempts employees subject to the railroad retirement legislation.[11] A statement by the Social Security Board of its position is appended hereto as Appendix E, *infra*, p. 84.

We think that inclusion of this statement is particularly appropriate in view of the conflict in the lower courts, and the circumstance that Government counsel in the present cases are charged with the responsibility of representing the Retirement Board. While we have endeavored to set forth all the pertinent materials in our brief, it is hoped that the statement of the Social Security Board's views will assist the Court in reaching a considered judgment.[12]

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[11] Social Security Act, Sec. 209 (b) (9), 42 U. S. C. Sec. 409 (b) (9); Internal Revenue Code, Secs. 1426 (b) (9), 1607 (c) (9.

[12] The definition in Section 1 (a) was first embodied in the Railway Labor Act amendment and the original Railroad Retirement Act (held invalid in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330), both of which were enacted in June 1934. 48 Stat. 1185, 1283. In 1934 there was no Social Security Act, so that the Retirement Act was un-

I

THE BOARD HAS PROPERLY CONSTRUED THE ACT

A. THE LANGUAGE OF THE ACT SUPPORTS THE BOARD'S INTERPRETATION

Under the Act's coverage provisions, the operation of facilities and equipment and the performance of the service must be "in connection with the transportation of passengers or property by railroad," or "in connection with" the "receipt, delivery * * * storage, or handling of property transported by railroad" by a carrier subsidiary. The statute was designed to apply to the railroad industry, and only subsidiaries performing services "connected" with transportation or other services performed by railroads were to be reached. Both by regulation and decision the Board has filled in the statutory definition, giving content to its general sweep. The Board's

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doubtedly intended to be liberally construed without regard for the existence of a general old age benefit system. Although the Social Security Act, with its special exception for persons subject to the railway legislation, became law in 1935, before the reenactment of the Retirement Act in its present form in 1937, the coverage provisions of the latter statute in so far as pertinent here were not changed and were undoubtedly meant to have the same meaning as before.

The taxes collected under the Railroad Retirement system are higher than under the Social Security Act. The benefits paid to individual claimants are likewise generally considerably higher, but the provisions in the Social Security Act for additional payments to wives and minor dependent children and for payments to surviving wives and minor dependent children sometimes result in families receiving larger amounts under the Social Security Act.

criterion is whether the service is "reasonably directly related, functionally or economically, to the performance" of a railroad's common carrier obligation. In amplification of this text the Board stated in its opinion in the instant case (R. 32):

> the Board has construed the carrier-affiliate coverage provision as denoting services which are an integral part of, or are closely related to, the rail transportation system of a carrier and as including within its coverage (1) carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, such as loading and unloading railroad cars, receipt, delivery, transfer in transit, and other handling of property transported by railroads; and also (2) carrier affiliates engaged in activities which enable a railroad to perform its rail transportation, such as maintenance and repair of way and equipment, and activities which enable a railroad to operate its rail system more successfully and to improve its services to the public, such as auxiliary bus transportation, dining facilities, and incidental warehousing services.

This interpretation of the statute gives effect to all the language employed by Congress and adheres to the legislative objective of providing benefits for employees within the railroad industry whether employed by a carrier or its subsidiary. It also fits

within the ordinary meaning of the words, for it cannot be denied that the storage and other functions such as are performed by Duquesne are in a real and substantial sense "connected with" the transportation of property by railroad, and with storage and handling of "property transported by railroad."

On the other hand, Duquesne and the Second Circuit seek to construe the definition of "employer" in the Act as reaching only persons performing services while property is being transported, while it is in "transit", or while the railroad's obligation as carrier persists (R. 305). This would limit the definition to services which are a part of rail transportation and possibly exclude even some of such services, as we shall see. See pp. 26, 40–44, *infra*.

There is no point to most of the definition if that is all it means. The Act does not say "in the course of transportation" or "while being transported", but "in connection with the transportation", which is obviously a broader term. *Danciger* v. *Cooley*, 248 U. S. 319, 327;[13] *California* v. *United States*, 49 F. Supp. 474 (N. D. Cal.),

[13] In the *Danciger* case the Court said (248 U. S., at 327): "To be within the statute it is essential that the act of collecting the purchase price be done 'in connection with the transportation of' the liquor. The statute does not say 'in the transportation,' but 'in connection with' it. Transportation, as this court often has said, is not completed until the shipment arrives at the point of destination and is there delivered. * * * What Cooley did, while not part of the transportation, was closely connected with it."

affirmed, 320 U. S. 577;[14] *Wallzabenstein* v. *Industrial Commission*, 195 Wis. 15 (household domestic in farmhouse performs duties "in connection with such farm"); *J. Ray Arnold Lumber Corp.* v. *Richardson*, 105 Fla. 204 (hauling logs from woods to railroad constitutes work "in connection with" the lumber mill); *Gurney* v. *Atlantic & G. W. Ry. Co.*, 58 N. Y. 358, 366–372 (an attorney independently retained by railroad company an employee "in connection with that company's railways"); *Kokusai Kisen Kabushiki Kaisha* v. *Columbia S. Co.*, 23 F. Supp. 403, 405–406 (S. D. N. Y.), affirmed without opinion, 100 F. 2d 1016 (C. C. A. 2d). And the expressions following "transportation" presumably add something further, even apart from the prefix "in connection with," or they would not be used. Although delivery, receipt and handling may be a

[14] In the *California* case the district court stated (49 F. Supp., at 478):

"It is inadmissible to suppose that this phrase limits the definition of 'other persons' to those whose operations form part of the act of water transportation for the result would follow that no persons are affected other than common carriers by water. We need not labor the point. The statutory verbiage seems clear enough as it stands."

On the same point this Court stated (320 U. S., at 586):

"And whatever may be the limitations implied by the phrase 'in connection with a common carrier by water' which modifies the grant of jurisdiction over those furnishing 'wharfage, dock, warehouse, or other terminal facilities,' there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission."

part of transportation in some circumstances, they need not be. And storage even more clearly does not have the same meaning as transportation, although some storage may be included within it.

The Act on its face thus refutes the contention that the definition in Section 1 (a) means only "transportation". For such a construction would make most of the words in the definition surplusage, or a prolix way of stating a simple thought. The simple phrase "services in the course of transportation" would have sufficed.

Even more clearly is the statutory language inconsistent with the more restrictive interpretation limiting it to services performed pursuant to a railroad's obligation as a carrier. Services may be "transportation"—and thus obviously be "connected with transportation"—even if the carrier is not obligated to perform them. See pp. 40–44, *infra*. Carriers are not required to load or unload carload freight or to provide pick-up and delivery service or transit privileges, but when they undertake such operations they are furnishing transportation service, and even more patently, service "connected with" transportation, receipt, delivery and storage of property transported.[15] We fail to see any basis in the words employed by Congress for the narrow construction suggested by Duquesne.

[15] See cases discussed *infra*, pp. 40–44.

B. THE LEGISLATIVE HISTORY OF THE STATUTE IS NOT INCONSISTENT WITH THE BOARD'S INTERPRETATION

The legislative history of the Act does not disclose any Congressional intention inconsistent with the statute's language. It was undoubtedly intended that the Act was to have the same general scope as the Interstate Commerce Act. But there are also specific manifestations of an intention that the Act not be strictly limited to "transportation" services, for it was clearly contemplated that controlled contractors or subsidiaries engaged in maintenance of railroad cars and equipment be covered. And even if the legislative design be regarded as having embodied substantially the definition of "transportation" in the Interstate Commerce Act,[16] the insertion of the carrier affiliate provision shows a definite intention to reach all services performed by affiliates which would have been included within the Interstate Commerce Act definition if performed by the carriers themselves.

The purpose of extending the statute beyond the employees of railroad companies is disclosed in the legislative history. The definition in the Retirement Act comes, without substantial change, from the Railway Labor Act of 1934.[17] The only

[16] Section 1 (3) of the Interstate Commerce Act is set forth in Appendix D, *infra*, p. 81.

[17] Section 1, First of the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. sec. 151, First, is set forth in Appendix C, *infra*, p. 80.

pertinent comments in the proceedings leading to the adoption of the latter statute are those by Commissioner Eastman, who as Federal Coordinator of Transportation was instrumental in drafting the Labor Act and explained its provisions to the legislative committee. The bill first proposed by Mr. Eastman reached only services covered by the Interstate Commerce Act's definitions of "railroad" and "transportation".[18] Mr. Eastman explained that he intended the bill to reach not only carriers covered by the Interstate Commerce Act (as had the Railway Labor Act of 1926), but also "operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act."[19] In particular he mentioned refrigerator car companies, which had been held not subject to the Interstate Commerce Act,[20] and companies to which railroads have "on occasion contracted out their maintenance work on equipment and even on way and structures,"[21] which also were not included within the Commerce Act definition. He stated that he was "not sure" the language originally suggested, which would

[18] Hearings before Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2d Sess., p. 1.

[19] *Id.*, pp. 10–11.

[20] *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434; *United States* v. *Interstate Commerce Commission*, 265 U. S. 292; *In the Matter of Private Cars*, 50 I. C. C. 652; *Perishable Freight Investigation*, 56 I. C. C. 449.

[21] Hearings, *supra*, p. 10.

not have gone beyond the Commerce Act definition, reached "all companies to which railroads on occasion have contracted out their maintenance work" [22] and that the definition "perhaps should be examined rather carefully from that point of view." [23] After the Chairman of the Committee had objected to the technique of incorporating by reference the definitions of the Interstate Commerce Act,[24] Mr. Eastman redrafted the definition, to include companies owned or controlled by carriers and performing the services specified in the Act as finally adopted. He then stated, perhaps not entirely consistently with his own prior remarks, "I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation." [25] Mr. Eastman further declared before the House Committee which subsequently considered

[22] At least 25 carriers had used this device as a means of escape from the labor provisions of the Transportation Act, 1920. *Railway Employees' Department, A. F. of L.* v. *Indiana Harbor Belt R. Co.*, 3 U. S. Railroad Labor Board 332; Resolution, *id.*, pp. 1137, 1138. The resolution stated that: "the board is in possession of information to the effect that certain carriers have violated the wage and rule decisions of the board by contracting out the work of the railway employees, with the result that wages have been unlawfully reduced, and rules and working conditions unlawfully changed, and that certain carriers have violated and failed to put into effect the decisions of the board which held such contracts to be unlawful."

[23] Hearings, *supra*, p. 11.

[24] *Ibid.*

[25] *Id.*, p. 145.

the bill: "The definition includes words descriptive of such transportation service which are taken from the provisions of the Interstate Commerce Act." [26] "It seemed to me that a satisfactory compromise would be to limit the definition to railroads or similar companies and the subsidiaries which they control which are engaged in transportation service recognized by the Interstate Commerce Act." [27]

The language of the Railway Labor Act was taken substantially without change into the Retirement Act and related legislation. The few references to its meaning in the history of the latter statutes are, of course, pertinent as manifesting the Congressional understanding. The Retirement Act of 1937 (50 Stat. 307, 45 U. S. C. sec. 228a (a)), which we are considering, amended the original definition in the Railway Labor Act and the earlier Retirement Acts [28] explicitly to exclude "casual service, and the casual operation of equipment or facilities," and to include "railroad associations, traffic associations, tariff bureaus, demur-

[26] Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2d Sess., p. 17.

[27] *Id.*, p. 18.

[28] The first Railroad Retirement Act, which was enacted June 27, 1934, 48 Stat. 1283, was declared invalid in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330. A revised measure was passed August 29, 1935, 49 Stat. 967, 45 U. S. C. Secs. 215–228. After being held invalid by a district court in the District of Columbia, this Act was amended by and incorporated in the Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C. Sec. 228a, *et seq.*

rage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation."

The Senate Committee Report (No. 697, 75th Cong., 1st Sess., p. 7) explained the exclusion as follows:

> it is intended to exclude employees of a contractor who may, for example, be occasionally employed by a "carrier" to repair a depot or build a bridge. Contractors, other than those which perform casual service, would not be excluded, irrespective of whether control be legal or de facto. * * *
>
> By these changes there are brought within the scope of the act substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States.

Such non-casual contractors engaged in repair and construction work, who were not thought to be excluded from the Act, would not have been regarded as engaged in transportation in the ordinary sense, or within the meaning of the Interstate Commerce Act.

The inclusion of railroad associations and bureaus was explained in both the House and Senate Committee reports (H. Rept. No. 1071, 75th Cong., 1st Sess., p. 3; S. Rept. No. 818, 75th Cong., 2d

Sess., p. 2) in the Carriers Taxing Act (50 Stat. 435, 45 U. S. C. sec. 261) as follows:

> While it seems clear that it is the intent of the present Act to embrace within its scope the various railroad associations, the matter is now to be made clear beyond question by a specific inclusion of such organizations.

The Senate Report on the Retirement Act (S. Rept. No. 697, 75th Cong., 1st Sess., pp. 6–7) also declared that such associations "probably are embraced in [the] very general terms" of the earlier statute. Since some of such associations are not engaged in railroad transportation in any sense of the term, Congressional recognition that they were within the scope of the carrier-affiliate coverage provisions of the 1935 Acts is evidence that Congress did not think those provisions were restricted to organizations engaged in railroad transportation either in the ordinary sense or as defined in Section 1 (3) of the Interstate Commerce Act.

More closely pertinent to the present case is the observation of Senator Wagner, who was in charge of the Retirement Bill in the Senate, that (81 Cong. Rec. 6223):

> It [the 1937 Retirement Act] has certain advantages over the present act.
>
> In the first place, the coverage is extended expressly to railroad labor organizations, railroad associations, traffic associations,

and is made more clearly applicable to subsidiaries of railroad companies such as refrigerator, *storage and other facilities*. In other words, *it covers a greater number of employees, not only those directly in the railroad business but those associated with it*, and in that regard it is more liberal than the present act. [Italics supplied.]

The reference to "storage", of course, fits this case. And the statement that the Act covers not only those employees "directly in the railroad business but those associated with it" indicates that coverage was to include services not forming a part of railroad transportation.

At the hearing on the 1937 bill Mr. George M. Harrison, Chairman of the Railway Labor Executive Association, who explained the provisions of the bill, gave as an illustration of a subsidiary subject to the Act:[29]

> For instance, they have elevator companies that handle the *storage* of grain. They may be indirectly owned or controlled by a railway company. It is a railway facility. But it is operated through a subsidiary organization. If they did not have the subsidiary organization, it probably would have its own grain elevator.
>
> This act covers those men. They may have a refrigerator car company. They may have a subsidiary organization han-

[29] Hearings before House Ways and Means Committee on H. R. 6448, 75th Cong., 1st Sess., p. 9.

dling some of their mechanical work; some of their accounting and collecting.

Mr. Harrison also made statements to the effect that the definition reached carrier-controlled companies "when those companies are engaged in the business of transporting passengers or property for the railroad, or other service that is a part of railway transportation," [30] and that it reached controlled companies "engaged in the business of transporting passengers or property." [31]

Mr. Harrison, like Mr. Eastman, when discussing the subject generally, spoke with reference to the term "transportation" employed in the Interstate Commerce Act; but when giving illustrations of what was to be covered, he mentioned activities which do not seem to come within the Commerce Act concept of "transportation."

The inference which we draw from the legislative history [32] is that Congress meant to reach the

[30] See Hearings before House Committee on Interstate and Foreign Commerce on H. R. 6956, 75th Cong., 1st Sess., p. 17.

[31] Hearings before House Ways and Means Committee on H. R. 6448, 75th Cong., 1st Sess., p. 6.

[32] The definition was subsequently amended in 1940, upon the recommendation of the Retirement Board, so as to exclude employers and employees engaged in the mining of coal. 54 Stat. 785. Section 6 of the amendatory act provided that

"Nothing contained in this Act, nor the action of Congress in adopting it, shall be taken or considered as affecting the question of what carriers, companies, or individuals, other than those in this Act specifically provided for, are included in or excluded from the provisions of the various laws to which this Act is an amendment."

customary operations of the railroads covered by the Interstate Commerce Act and to prevent evasion of the newer statutes by the use of subsidiaries or controlled contractors to carry out portions of the railroad's business. A company which repaired cars and locomotives, to take one of the illustrations cited, would not have been engaged in transportation itself within the meaning of the Interstate Commerce Act, or in activities which a carrier was obligated by its tariff to perform. Such companies have, however, uniformly been held subject to the Act. *Nevada Consolidated Copper Co.* v. *Railroad Retirement Board,*

The amendment, which applied to the definitions in the Railway Labor Act, the Railroad Retirement Act, the Carriers Taxing Act, and the Railroad Unemployment Insurance Act, was explained in the Senate Committee report (No. 1744, 76th Cong., 3d Sess., pp. 2–3), as follows:

"Certain carriers by railroad own and operate coal mines directly with their own employees. In addition, another and larger group of carriers have wholly owned subsidiaries engaged in mining coal for the purpose of servicing railroad operations through supplying locomotive fuel for the railroad system of the parent carrier. * * *

* * * [After] * * * a hearing * * * the Board found itself compelled by the statutory language to conclude that these companies are legally subject to the Railroad Retirement Acts and the Railroad Unemployment Insurance Act. The opinion of the Board with respect to the status of Union Pacific Coal Co., copy of which has been forwarded to the committee, shows that the conclusion was dictated not by any feeling of the Board that such coal mining operations ought, as a matter of policy, to be covered by the acts administered by the Board, but rather by consistent application of the interpretation of the acts promulgated in rulings that other carrier affiliates engaged

129 F. 2d 358 (C. C. A. 10), certiorari denied, 317 U. S. 687; *Despatch Shops, Inc.* v. *Railroad Retirement Board*, 60 F. Supp. 106 (S. D. N. Y.); *Despatch Shops* v. *Railroad Retirement Board*, No. 24451, D. D. C., decided March 19, 1945.[33]

Maintenance of way, structures, and equipment is mentioned as an example of a type of situation clearly shown by the legislative history to be intended to be covered by the Retirement Act—as the Social Security Board concedes (*infra*, p. 85)—and yet not subject to the jurisdiction of the Interstate Commerce Commission under the definition of "transportation" in Section 1 (3)

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in such activities as manufacturing and supplying equipment parts, furnishing water for locomotives, furnishing auxiliary or substitute bus or water transportation, furnishing dining facilities, treating ties, transmitting telegraphic communications, providing hospital and medical facilities, and providing maintenance of buildings, are employers subject to the acts. The Board, as well as railroad employers, railroad employees, the mine workers, the Federal Security Administrator and State unemployment compensation administrations, believes that as a matter of policy such coal-mining activities, whether conducted directly by carriers or by subsidiaries of carriers, should for purposes of a social-insurance program and for purposes of labor relations be covered by the system of laws applicable to coal mining generally rather than the system of laws applicable to the railroad industry. The committee believes such a policy to be sound and, accordingly, recommends the enactment of S. 4070 so as to exclude coal-mining operations from the acts covering the railroad industry without disturbing or prejudicing the application of those acts to other railroad affiliates. Section 6 of the bill makes this purpose clear."

[33] The two *Despatch Shops* cases have been appealed.

of the Interstate Commerce Act. Once it is recognized that there exists any type of activity which, although not so subjected to the Commission's jurisdiction, is nevertheless covered by the Retirement Act, the decisive issue in each case of carrier affiliate coverage must then be not whether the company is engaged in operations or the performance of services covered by the definition of "transportation" in Section 1 (3) of the Interstate Commerce Act but whether it comes under the particular language of Section 1 (a) of the Retirement Act—whether it is sufficiently closely connected with transportation or the enumerated services. This is the Retirement Board's test. There is no middle ground indicated by the carrier affiliate coverage provisions of Section 1 (a); either those provisions include more than the specifically enumerated services, and thus more than "transportation" covered by Section 1 (3) of the Interstate Commerce Act, or they are strictly limited to such "transportation." But as has been emphasized, the latter restrictive view, compelling as it would the exclusion from the coverage of the Retirement Act of employees of carrier affiliates engaged in work so intimately and integrally related to railroad transportation as railroad maintenance of way, structures, and equipment, and the like, would mean a confinement of coverage of the Act too restrictive in effect to be consistent with a reasonable view of

the Congressional intention. The intention to reach such employers demonstrates that the statutory definition was intended to have a broader content than is claimed by Duquesne.[34]

The legislative materials thus indicate that as to certain peripheral activities the Railway Labor Act and the Retirement Act were not intended to have exactly the same meaning as the definition in Section 1 (3), a difference which finds support in differences in the language. For while Section 1 (3) of the Interstate Commerce Act (*infra*, p. 81) refers to "transportation," it does not contain the phrase "in connection with the transportation" found in the Retirement Act, which is clearly

[34] Duquesne relies upon a statement by the Board in its 1938 Annual Report, p. 142 (No. 103, R. 60), that:

"Storage of property received for a carrier and awaiting transportation by the carrier, or awaiting delivery by the carrier following transportation, is an employer service; but performance of the usual commercial storage and warehouse business is not. * * *"

The pertinence of this statement depends upon the meaning of "usual commercial storage and warehouse business." If a warehouse business were conducted off the line of the parent corporation, or if the warehouse business were not so completely devoted to the storage and handling of goods transported by the parent railroad, the quoted language might apply. But the Board has not regarded warehousing activities connected with railroad operations as closely as in the present case as "the usual commercial storage and warehouse business." If there should be any question as to whether this is the proper interpretation of the Board's Annual Report, it should be noted that the majority of the Board which decided the present case also constituted a majority of the Board in 1938.

broader. Furthermore, the Interstate Commerce Act definition was incorporated in a statute designed to regulate the relation between carriers and shippers, and the problems of coverage presented by statutes regulating the employment relationship were not at all in mind. As this Court noted in *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 312, with respect to various sections of the Interstate Commerce Act itself containing "the same phraseology", the meaning may vary with the "purpose in view."[35] While some of the comments during committee hearings show an intent to restrict coverage to the transportation reached by the Interstate Commerce Act, statements in the committee reports and explanations by legislators in charge of the bills, which are entitled to more weight than testimony of witnesses before committees, rebut such a restrictive interpretation. In these circumstances the legislative history cannot be said to overcome the normal meaning of the words of the statute.

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[35] The phrase "in connection with transportation", or words of similar import, although not appearing in Section 1 (3) of the Interstate Commerce Act, is found in Sections 1 (5), 6 (7) and 15 (13), quoted *infra*, pp. 82–83. But in each of those sections the phrase clearly is used in relation to the regulation of rates, fares, charges and allowances. These sections, along with Section 1 (3), originally appeared in the Hepburn Act of 1906, 34 Stat. 584, 587, 590, which was concerned only with the regulation of such matters.

In addition, uncertainty as to the meaning of the Interstate Commerce Act definition makes it an unsafe standard to follow in applying the Retirement Act. Duquesne contends that only those services which a carrier is obligated to perform are transportation services. But the decisions on the proposition under the Interstate Commerce Act itself are not in entire accord.

We deal at greater length in Point II (*infra*, pp. 61–67), with the cases relating to warehousing itself. In one of these the Interstate Commerce Commission flatly declared (*American Warehousemen's Association* v. *Inland Waterways Corp.*, 188 I. C. C. 13, 15):

> It is well recognized, however, that there are many things which a carrier may voluntarily do which it can not be required to do, and if it holds itself out to and does render storage service in connection with shipments subject to our jurisdiction such service, although not a service which it could be required to perform, is nevertheless included in the term "transportation" as defined by the interstate commerce act.

See also *C. C. C. & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588, quoted *infra*, p. 62. Similarly, although a railroad normally is not obligated to, and does not, load or unload carload freight,[36] when it elects to do

[36] *Loading and Unloading Carload Freight*, 101 I. C. C. 394. Cf. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 504–505.

so "it makes of that loading a transportation service," even where the service is not covered by a filed tariff. *David Berg Industrial Alcohol Co.* v. *Reading Co.*, 142 I. C. C. 161, 163; *Haberman* v. *Pennsylvania Railroad Co.*, 234 I. C. C. 167.[37] Pick-up and delivery service, though not required of a carrier, constitutes rail transportation when the carrier elects to perform it. *Scott Bros., Inc., Collection and Delivery Service*, 4 M. C. C. 551, 552–555; *Pick-up and Delivery in Official Territory*, 218 I. C. C. 441, 473; *Coordination of Motor Transportation*, 182 I. C. C. 263, 268; *New York Dock Ry.* v. *Pennsylvania Railroad*, 62 F. 2d 1010, 1014 (C. C. A. 3), certiorari denied, 289 U. S. 750.

In other cases the Commission and lower courts have spoken as if the definition in Section 1 (3) was limited to services which formed a part of the railroad's obligation to transport. *Propriety of Operating Practices—New York Warehousing*, 216 I. C. C. 291, 348–349, affirmed in *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507; *New York Central & H. R. R. Co.* v. *General Electric Co.*, 83 N. Y. Misc. 529, 536–537 (Sup. Ct. N. Y.), affirmed, but not with reference to this point, 219 N. Y. 227, certiorari

[37] This decision preceded the provision in the Transportation Act of 1940 definitely subjecting pick-up and delivery service to Part I of the Interstate Commerce Act. See Section 202 (c) of the Interstate Commerce Act, 54 Stat. 920, 49 U. S. C. sec. 302c. The opinion of the Commission in 4 M. C. C. reverses that of Division 5, printed in 2 M. C. C. 155, upon which Duquesne relied in its briefs below.

denied, 243 U. S. 636; *American Sugar Refining Co.* v. *Delaware, L. & W. Ry. Co.*, 200 Fed. 652 (D. N. J.), reversed on other grounds, 207 Fed. 733 (C. C. A. 3); *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.*, 287 Fed. 334, 337. (C. C. A. 2), certiorari denied, 262 U. S. 743. And this Court has on occasion used the phrase "service of transportation" as the equivalent of "transportation services which the carriers are bound to render," although not with reference to any issue such as is presented here. *United States* v. *American Tin Plate Co.*, 301 U. S. 402, 407–408; *United States* v. *Wabash R. Co.*, 321 U. S. 403, 406, 408, 410; *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507.

But the question in most of the above cases, including particularly those in this Court, was the right of a shipper to payment or special rates for services performed by him which the carrier was not obligated to perform, such as car spotting within a plant,[38] or hauling from plant to station.[39] The cases involving warehouses were also concerned with the lawfulness of practices resulting in dis-

[38] *New York Central & H. R. R. Co.* v. *General Electric Co.*, 83 N. Y. Misc. 529, 536–537 (Sup. Ct. N. Y.), affirmed, but not with reference to this point, 219 N. Y. 227, certiorari denied, 243 U. S. 636; *United States* v. *American Tin Plate Co.*, 301 U. S. 402, 407–408; *United States* v. *Wabash R. Co.*, 321 U. S. 403, 406, 408, 410.

[39] *American Sugar Refining Co.* v. *Delaware, L. & W. Ry. Co.*, 200 Fed. 652 (D. N. J.), reversed on other grounds, 207 Fed. 733 (C. C. A. 3); *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.*, 287 Fed. 334, 337 (C. C. A. 2), certiorari denied, 262 U. S. 743.

criminatory or preferential treatment for certain shippers or warehouses.[39] To have allowed certain shippers to have obtained such advantages through performing, or receiving the benefit of, services not required of the carrier would have resulted in the kind of preference which the Interstate Commerce Act prohibits. Whether the carrier was obligated to perform the services was the vital factor in such cases. But, as the Commission recognized when the point was relevant (see p. 40, *supra*), a carrier may perform voluntary services "which it cannot be required to do" as long as it charges fairly for them, and such services when so performed come within the statutory definition of transportation.

The conclusion we draw from this review of authorities under the Interstate Commerce Act is that, just as this Court has held that "there is no single concept of interstate commerce which can be applied to every federal statute regulating commerce" (*McGleod* v. *Threlkeld*, 319 U. S. 491, 495; *Kirschbaum* v. *Walling*, 316 U. S. 517, 520), there has been no uniformly accepted concept of "transportation" under the Interstate Commerce Act. See *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124 (employee). As we have noted, the same principle has been applied to the interpretation of different

[39] *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501.

sections of the Interstate Commerce Act. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 312. See also, *United States* v. *Colorado & N. W. R. Co.*, 157 Fed. 321 (C. C. A. 8), certiorari denied, 209 U. S. 544, which held that "common carrier engaged in interstate commerce" did not necessarily possess the same meaning in the Safety Appliance Act as in the Interstate Commerce Act."[11] The various ways in which cases have arisen have resulted in practical determinations which do not seem entirely consistent in theory, although the decisions themselves are not inharmonious.

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[11] In the *Colorado* case the court said (157 Fed., at 330):

"The subject of the first act was the contracts, the rates of transportation of articles of interstate commerce; the subject of the safety appliance acts was the construction of the vehicles, the cars, and engines which carry that commerce. The evils the former was passed to remedy were discrimination and favoritism in contracts and rates of carriage; the evils the latter was enacted to diminish were injuries to the employes of carriers by the use of dangerous cars and engines. The remedy for the mischiefs which induced the passage of the former act was equality of contracts and rates of transportation; the remedy for the evils at which the latter act was leveled was the equipment of cars and engines with automatic couplers. Neither in their subjects, in the mischiefs they were enacted to remove, in the remedies required, nor in the remedies provided, do these acts relate to similar matters, and the rule that the words or terms of acts in pari materia should have similar interpretations ought not to govern their construction."

In the circumstances we believe that, even if Congress intended generally that the definition in the Retirement Act have the same meaning as in the Interstate Commerce Act, no particular intent is established as to borderline situations. Since the decisions under the Commerce Act on such matters turned on and varied with the nature of the particular case and the object of the substantive provision involved, they would have furnished Congress with little guidance in relation to a statute with different objectives. The least that can be said is that the authorities under the Interstate Commerce Act furnish no clear picture as to whether services not a part of a carrier's obligation are to be included in "transportation." Courts may give weight to legislative history and background in order to give meaning to ambiguous words; but a background which itself is not consistent will not be employed to create an ambiguity in language otherwise clear.

The net result is that the legislative history of the Act does not require the departure from the normal meaning of the words employed implicit in the confining interpretation sought by Duquesne. In the absence of such an artificial and rigid limitation upon the statutory language, an unstrained interpretation can be given the definition, in the light of the Act's objectives and

the non-controversial portions of the legislative history. We think these show that Congress intended the Act to cover the services and operations of a railroad subsidiary if the type of activity was such as a railroad might engage in during the conduct of the railroad's business, whether or not it is "transportation." See No. 103, R. 83. Put another way, if certain activities are economic services which a railroad may reasonably render in close relation to its normal transportation functions, they should be covered if performed by the railroad through a subsidiary.

This is in substance the criterion adopted by the Retirement Board—whether a service or operation is "reasonably directly related, functionally or economically, to the performance of obligations * * *, undertaken as a common carrier by railroad." We think this interpretation of the Act by the Board entirely proper, and that Duquesne cannot establish that the Board's test is erroneous as a matter of law. And even if the point be regarded as doubtful, the interpretation by the agency charged with the administration of the Act should be upheld. *Skidmore* v. *Swift & Co.*, 323 U. S. 134; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315, and cases there cited.

Such a test cannot, of course, be applied mechanically or without the exercise of judgment.

Few general rules can. But the list of cases noted in the margin [42] shows how the Retirement Board

[42] Board decisions holding railroad subsidiaries or affiliates subject to the Act cover, for example: telegraph companies (*Great Northwestern Telegraph Company of Canada*, Railroad Retirement Board Law Bulletin No. 2, 385); bus companies which function in coordination with or substitution for rail operations (*Kansas City Southern Transport Co.*, *id.*, p. 76; *Missouri Pacific Transport Co.*, *id.*, p. 88); tie-preserving companies (*Santa Fe Tie & Lumber Preserving Co.*, *id.*, p. 276); hospital associations (*Chesapeake & Ohio Ry. Employees' Hospital Ass'n*, *id.*, p. 211); railroad office building companies (*Southern Pacific Bldg. Co.*, *id.*, p. 371); railroad equipment manufacturing, repair, and maintenance companies (*Lenoir Car Works*, *id.*, p. 332; *Oneida Machinery Co.*, *id.*, p. 322; *Despatch Shops, Inc.*, *id.*, p. 310); water supply companies (*Beaver Creek Water Co.*, *id.*, p. 550; *Union Pacific Water Co.*, *id.*, p. 546); railroad dining car companies and eating houses (*Fred Harvey Dining Car Operations*, *Fred Harvey*, and *Fred Harvey Service, Inc.*, *id.*, pp. 135, 138, 140); barge companies (*Kelley's Creek Barge Line, Inc.*, *id.*, p. 13); railroad land companies (*Rock Island Improvement Co.*, *id.*, p. 266); dock and terminal companies (*Allouez Bay Dock Co.*, *id.*, p. 168; *Long Dock Co.*, *id.*, p. 169).

Board decisions holding railroad subsidiaries or affiliates not subject to the Act cover: bridge companies (*Bridge Company*, Railroad Retirement Board Law Bulletin No. 2, p. 41); independently operated passenger motor bus companies (*Soundview Transportation Company*, *id.*, p. 111; *Jamieson Stages, Incorporated*, *id.*, p. 112); cement companies (*Arkansas Portland Cement Company*, *id.*, p. 120); lumber companies (*Frost Lumber Industries, Incorporated of Texas*, *id.*, p. 120; *Puget Sound Pulp and Timber Company*, *id.*, p. 303; *Southwest Lumber Mills, Incorporated and Cady Lumber Corporation*, *id.*, p. 306); investment companies (*American Contract and Trust Company*, *id.*, p. 201); real estate companies (*New York State Realty and Terminal Company*, *id.*, p. 270; *Penn-Haven Realty Company*, *id.*, p. 376); leather companies (*Union Tanning Company*, *id.*, p.

has applied its test, and that in the main it has held only affiliates engaged in operations closely related to railroading subject to the Act.

This does not mean that there have not been borderline cases as to which men of good faith have disagreed. With respect to steamship companies owned by railroads and interchanging traffic with them, the Board first held them not subject to the Retirement Act and then, after a contrary position was taken by the Bureau of Internal Revenue under the Carriers Taxing Act, reversed itself. The Social Security Board, which pays benefits to employees not covered under the Railroad Act, was of the view that the shipping companies were not reached by the railroad legislation. In *Allen* v. *Ocean Steamship Co.*, 123 F. 2d 469 (C. C. A. 5) and *Magruder* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130 (C. C. A. 4), it was held that the railroad legislation did not apply, and the Solicitor General did not apply for certiorari.[43] These decisions can

272); railroad car manufacturing and vending companies (*Pullman Standard Car Manufacturing Company*, *id.*, p. 344); chemical companies (*Pennsylvania Salt Manufacturing Company*, *id.*, p. 363); *Michigan Alkali Company*, *id.*, p. 364); toll road companies (*Harbor Island Causeway Company*, *id.*, p. 523); public water supply companies (*Lykens Water Company*, *id.*, p. 553); hotel companies (*Maple Shade Inn, Pulaski, Virginia*, *id.*, p. 260).

[43] To the extent that the courts in those cases regarded the Board's formula as erroneous and adopted the more limited tests here urged by respondent, we think they are incorrect.

stand as law without impairing the validity of the formula which the Retirement Board applies; for even under the Board's test it can be said that such a steamship line's operations are not sufficiently related to those of a railroad to be covered by railroad labor legislation.

In concluding this phase of the argument, a word should be said as to the alternative theory upon which the Board's decision was based—that Duquesne would be subject to the Retirement Act even if that Act reaches only companies engaged in transportation within the meaning of the Interstate Commerce Act. The legislative history of the definition in the Retirement Act, at the very least, indicates that Congress intended to reach activities which were transportation services when performed by the railroad companies themselves, whether or not the carrier performed the service directly or through a subsidiary or controlled contractor. This appears both from Mr. Eastman's statements in the Railway Labor Act hearings (*supra*, pp. 28–30), and the committee reports and other comments on the Retirement Act (*supra*, pp. 31–34). Mr. Eastman found the original definition in the proposed Railway Labor Act amendment inadequate because it would not have reached such contractors or affiliates, and he submitted a revision of the definition which contained the clause as to affiliates, which he admitted was

"new."* The test is not whether a subsidiary would itself be subject to the definition in the Interstate Commerce Act; the object of the new "affiliate" clause was to reach affiliates and subsidiaries which did not come under the older statute. It is thus clear that the Retirement Act goes beyond the Commerce Act at least to the extent of reaching carrier subsidiaries performing services which would be transportation under the Commerce Act when rendered by the railroads themselves. As we show *infra*, pp. 60–68, the Board could properly find that the services performed by Duquesne would have been transportation services if performed by Pennsylvania.

II

THE BOARD'S DETERMINATION THAT DUQUESNE'S WAREHOUSING SERVICES WERE SUBJECT TO THE RETIREMENT ACT SHOULD BE UPHELD

We have shown that the Board's interpretation of the statutory definition as reaching railroad

* See Hearings before Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., p. 146, where the following colloquy occurred after Mr. Eastman had read the proposed definition:

"Mr. EASTMAN. That, I may say, is some of the language in the Interstate Commerce Act.

"The CHAIRMAN. Is there some difference, however? Isn't this reference here to parent, subsidiary, and affiliated, new?

"Mr. EASTMAN. Yes. I am confining this now to the railroad subsidiaries because of the possible conflict with N. R. A. codes if we get into the outside field."

subsidiaries sufficiently functionally and economically related to railroading is a proper one, and that in the alternative the Act was at least meant to reach activities constituting transportation when performed by railroads themselves. The question then arises as to the application of these tests to respondent's warehousing activities.

Where the Board has applied the proper criteria in applying the statute, as we think it has, its decision as to whether a particular factual situation comes within the statutory standard will be accepted by the courts if not arbitrary or unsupported by substantial evidence, or, as it has been more precisely stated, "when there is found to be a rational basis for the conclusions." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 513; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131; *Gray* v. *Powell*, 314 U. S. 2. The scope of review of the administrative decision is the same whether or not the statute specifically so provides, so long as the administrative body is authorized by Congress to make the determination. Compare *Interstate Commerce Commission* v. *Louisville & N. R. R.*, 227 U. S. 88, 92, and *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, with *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, and *National Labor Relations Board* v. *Hearst*

Publications, Inc., 322 U. S. 111. And it is immaterial that the question is one as to the application or coverage of the statute (*National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131; *Gray* v. *Powell*, 314 U. S. 402; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145–146), or that the underlying facts are not in dispute (*Gray* v. *Powell*, 314 U. S. 402, 412; *United States* v. *Louisville & N. R. R.*, 235 U. S. 314).

There can be no question that the Railroad Retirement Board, upon which is imposed the duty of paying annuities and benefits to employees, or their survivors, has statutory authority to determine which employees are entitled to the payments. That issue of coverage is necessarily involved in every award of annuities or benefits under the Act; and since all coverage is determined by reference to the definition of "employer",[45] the Board must first decide whether the particular employer comes within the statutory definition.[46] The Retirement Act, in providing for judicial review by district courts, empowers the courts to set aside a Board decision if there has

[45] Railroad Retirement Act, Section 1 (b), 45 U. S. C. Sec. 228a (b); Railroad Unemployment Insurance Act, Section 1 (d), 45 U. S. C. Sec. 351 (d). See pp. 71, 76 *infra*.

[46] Section 10 of the Retirement Act (45 U. S. C. sec. 228j (b)) provides that: "The Board shall have and exercise all the duties and powers necessary to administer this Act" and "The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of such Act." Section

been "a violation of a legal right." Section 11, 45 U. S. C. Sec. 228k. This expression would appear to have the same meaning as "if not in accordance with law," a phrase used in several other statutes,[47] and as "contrary to law", which was the first statement of what came to be known as the substantial evidence rule in the early Interstate Commerce Commission cases.[48] The Railroad Unemployment Insurance Act specifically embodies the substantial evidence rule (Section 5 (f), 45 U. S. C. Sec. 355 (f)), and the courts have uniformly held that the rule applies in reviewing Retirement Board decisions.[49] These well established principles demonstrate that the finding of the Retire-

11 provides for judicial review of the Board's decisions in the instance of "an employee or other person aggrieved." The Railroad Unemployment Insurance Act provides (Section 5 (b), 45 U. S. C. 355b): "The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits." Section 5 (c) makes express provision for employer participation in proceedings where the employer's status is in issue, and for judicial review. See pp. 72–73, 76–79.

[47] Longshoremen and Harbor Workers Compensation Act, Sec. 21 (b), 44 Stat. 1436, 33 U. S. C. Sec. 921b; Tax Court, Internal Revenue Code, Sec. 1141c (1).

[48] *Interstate Commerce Commission* v. *Louisville & N. R. R.*, 227 U. S. 88, 92; *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 470. See Stern, *Review of Findings of Administrators, Judges and Juries*, 58 Harv. L. Rev. 70, 74–76.

[49] *South* v. *Railroad Retirement Board*, 131 F. 2d 748 (C. C. A. 5), certiorari denied, 317 U. S. 701; *Watts* v. *Rail-*

ment Board as to whether a particular employer comes within the statutory standard is binding upon the courts if a reasonable mind might reach the same conclusion.

A. THE BOARD'S FINDING THAT DUQUESNE'S OPERATIONS ARE DIRECTLY RELATED FUNCTIONALLY AND ECONOMICALLY TO THE PERFORMANCE OF PENNSYLVANIA'S RAILROAD TRANSPORTATION AND TO THE RECEIPT, DELIVERY, TRANSFER IN TRANSIT, STORAGE AND HANDLING OF PROPERTY TRANSPORTED BY PENNSYLVANIA BY RAILWAY IS REASONABLE

We think that the Board's finding that Duquesne's warehouses are subject to the statute is

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road Retirement Board, 150 F. 2d 113 (C. C. A. 5); *Ellers* v. *Railroad Retirement Board*, 132 F. 2d 636 (C. C. A. 2); *Taylor* v. *Latimer et al.*, 47 F. Supp. 236 (W. D. Mo.); *Bruno* v. *Railroad Retirement Board*, 47 F. Supp. 3 (W. D. Pa.); *Holloway* v. *Railroad Retirement Board*, 44 F. Supp. 59 (N. D. Ga.); *Despatch Shops, Inc.* v. *Railroad Retirement Board*, 60 F. Supp. 106 (S. D. N. Y.); *Frawley* v. *Latimer*, 57 F. Supp. 276 (D. N. J.); *Morris* v. *Railroad Retirement Board*, D. D. C., Civil No. 10629 (May 9, 1942); *Canfield* v. *Railroad Retirement Board*, D. D. C., Civil No. 14264 (May 4, 1942); *Donahue* v. *Railroad Board*, S. D. Iowa, Central Div., Civil No. 109 (February 21, 1941); *Bray* v. *Railroad Retirement Board*, D. D. C., Civil No. 8211 (January 28, 1941); *Van Natta* v. *Railroad Retirement Board*, D. D. C., Civil No. 4387 (January 9, 1940); *Wing* v. *Railroad Retirement Board*, D. Colo., Civil No. 438 (November 23, 1942); *Welborn* v. *Railroad Retirement Board*, N. D. Ga., Civil No. 2755 (February 27, 1945) (cases without report citations are unreported). As was noted in the Government's brief in opposition in *Utah Copper Co.* v. *Railroad Retirement Board*, 1942 Term, No. 479, pp. 7–9, n., the Circuit Court of Appeals in that case, although reaching the correct decision, did not correctly follow this Court's rulings as to the scope of judicial review in cases involving questions of statutory coverage. See *Nevada Consolidated Copper Co.* v. *Railroad Retirement Board*, 129 F. 2d 358 (C. C. A. 10), certiorari denied, 317 U. S. 687.

a reasonable one, and, therefore, binding upon a reviewing court.

Duquesne's warehouses are located on Pennsylvania sidings in buildings part of which are used by the Pennsylvania itself as freight stations. Indeed, Duquesne merely leases its space from Pennsylvania. Most of the freight stored by Duquesne both comes in and goes out on Pennsylvania rail lines; almost all of it does one or the other. In the East Liberty warehouse all the sugar handled is held under storage in transit for shippers along the Pennsylvania.[50] Less than carload shipments are loaded and unloaded by Pennsylvania; carload shipments by respondent.

In *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507, this Court described the relationship between railroads and the warehousing services they provide, including storage by subsidiary companies. It was noted that all of the carriers in the New York area " 'now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies.' This business is carried on in various ways. "Some carriers lease space to shippers for warehousing; others have aided in financing structures on their property in which they lease space

[50] Duquesne also stored paper in transit in its Erie warehouse while that was operating (R. 138). It is not clear from the record whether or not Duquesne stores in transit in its Pittsburgh warehouse. Cf. R. 61 with R. 108 and R. 136–137.

from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations." (305 U. S., at 516.) The opinion then goes on to point out the advantages which a railroad may derive from an affiliated warehousing operation (*id.*, at 516–517):

> In all cases the carriers exercise sufficient control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the other of the carriers gained traffic by their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages. Obviously a shipper, who can secure transportation, storage, handling and insurance together from a carrier and its affiliates for an aggregate cost which is less than the sum for which he can secure the various services when purchased separately from carriers and non-affiliated enterprises, will deal with those offering the best terms. The storage largely determines the transportation route. To get the rail transportation of large shippers, the carriers sought them out and offered warehousing services and space below the rates of private warehousemen and below the cost to the carriers of the services rendered. It was not only a contest between carriers and private warehousemen but also between the carriers themselves.

> Traffic departments of the railroads became solicitors for warehousing business. Favored shippers were rented space by the carriers below compensatory figures.

The *Baltimore & Ohio* case was concerned with the preferences accorded shippers who availed themselves of carrier warehousing, as the above passages point out. But even apart from such advantages, none of which appear in the present records, the very proximity of Duquesne's warehousing facilities to Pennsylvania freight stations and sidings, together with Duquesne's operation by Pennsylvania officials, inevitably benefits Pennsylvania. Cf. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501; *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500; *McCormick Warehouse Co.* v. *Pennsylvania R. Co.*, 148 I. C. C. 299. If that were not so, Pennsylvania would not have gone into the warehousing business to the extent indicated by these and the foregoing cases. Indeed, last Term in *Interstate Commerce Commission and Pennsylvania Railroad Co.* v. *Parker*, No. 507, decided June 18, 1945, Pennsylvania argued (br. pp. 43, 48, 50–54, 62–66) that motor truck operations through a subsidiary could better be coordinated with its railroading functions than if the same operations were performed by an outside firm, and this Court agreed, saying (slip opinion p. 6): "Common management of railroad and trucks gave promise of better co-

operation than would be obtained by arms-length contracts or agreements." We do not think that this observation as to coordination between a railroad and its subsidiaries need be limited to trucking companies.

Other factors in the present record, though not themselves determinative, support the Board's finding as to the closeness of Duquesne's functions to Pennsylvania Railroad operations. Not only are Duquesne's officers Pennsylvania officials, but Duquesne's employees are members of the railroad brotherhood which represents Pennsylvania's own employees, not of the organizations representing warehouse workers not connected with railroads.[51] And Pennsylvania employs Duquesne to dispose of its unclaimed and damaged freight. In undertaking this activity Duquesne is clearly performing a function of the railroad. Such a service might well be one which a railroad would not permit to be performed for it except by a concern which it controlled.

[51] The constitutional jurisdiction of the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees extends only to employees, including storehouse and storeroom employees, of railroad or transportation companies. Peterson, *Handbook of Labor Unions* (American Council on Public Affairs, 1944), pp. 316–317. Warehousemen not connected with railroads are represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (*id.*, at 373), the United Retail, Wholesale and Department Store Employees of America (*id.*, at 330), and the International Longshoremen and Warehousemen's union (*id.*, at 202), *inter alia*.

We think these facts demonstrate that Duquesne is performing services covered by the statutory definition. Duquesne receives, delivers and stores property transported by railroad. And the disposal of unclaimed and damaged freight is plainly connected with rail transportation. These activities, by a company completely railroad-owned and controlled, are railroading functions. They are closely related economically to the actual transportation services inasmuch as the existence of Duquesne's storage facilities is undoubtedly advantageous to shippers and enables the railroad to operate its rail systems more successfully.

It is argued by Duquesne that it would be anomalous to hold that where one of two warehouses located side-by-side and similarly operated was owned by a railroad subsidiary and the other was not, the first would be subject to the Railroad Retirement Act and the second to the Social Security Act. This over-simplifies the problem, for there are three, not two, warehousing arrangements to be considered. A warehouse owned and operated directly by a railroad, even though managed in the same way as an independent warehousing company, would be subject to the railroad legislation. The uncontrolled warehouse would not be. A warehousing company owned and controlled by a railroad falls in between. It would be at least as anomalous to differentiate between two warehouses, one directly operated by a rail-

road and the other by a railroad's officials through a subsidiary, as between the latter and an independent company. In the case of *Propriety of Operating Practices—New York Warehousing*, 198 I. C. C. 134, 197 (affirmed in the *Baltimore & Ohio* case discussed *supra*) the Interstate Commerce Commission stated expressly that whether the warehousing facilities are owned and operated directly by the carrier or by affiliated companies "the result is always the same" and that "the substance and not the mere form of the relations should govern." When the operations of the subsidiary are so closely connected with the transportation of property by rail, it is appropriate that they be subject to railroad legislation.

B. THE BOARD'S FINDING THAT DUQUESNE PERFORMED SERVICES FALLING WITHIN THE DEFINITION OF TRANSPORTATION IN SECTION 1 (3) OF THE INTERSTATE COMMERCE ACT IS REASONABLE

The Board's finding, on the alternative theory, that Duquesne comes within the definition in Section 1 (a) of the Retirement Act is also not without a "rational basis" if the definition be given the same meaning as "transportation" in the Interstate Commerce Act.

Loading and unloading.—Duquesne loads and unloads carload freight. Although the carriers generally require shippers to do their own loading and unloading, in return for a lower carload freight rate, loading and unloading undoubtedly is "a part of * * * interstate transportation." *B. & O. S. W. R. Co.* v. *Burtch*, 263 U. S. 540, 544; *Atchison T. & S. F. Ry. Co.* v. *United*

States, 295 U. S. 193, 198;[32] *Adam* v. *Mills*, 286 U. S. 397. Certainly if the carrier had performed the service, whether or not there was an additional charge on the shipper, there would be no question as to its being transportation. *Haberman* v. *Pennsylvania R. Co.*, 234 I. C. C. 167, 173; *Loading and Unloading Carload Freight*, 101 I. C. C. 394. This is sufficient to bring performance of the same service by a carrier subsidiary within the Retirement Act. See pp. 27, 49–50, *supra*.

Storage.—In a series of cases this Court has held that storage performed by a railroad was "transportation" within the meaning of the language now contained in Section 1 (3) of the Interstate Commerce Act. *C. C. C. & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588; *Southern Railway* v. *Prescott*, 240 U. S. 632; *Western Transit Co.* v. *Leslie & Co.*, 242 U. S. 448. These cases held that the limitation of liability in bills of lading approved by the Interstate Commerce Commission precluded application of state laws imposing a greater liability upon carriers for loss of goods stored. Significantly in those cases the goods had been held by the carrier in storage 35 days, 11 days, and "nearly 4 months" before the loss or damage occurred, and in each case it was assumed that "the goods [were] held by the carrier strictly as warehouseman" (242 U. S., at 453) and not as carrier.

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[32] "In the absence of understanding or agreement to the contrary, transportation includes loading and unloading" (295 U. S., at 198).

It will be suggested that these cases relate only to "the involuntary storage of goods incidental to transportation" (*Baltimore & O. R. Co.* v. *United States*, 305 U. S., at 516), which might be regarded as a part of transportation in the strict sense. Although the *Dettlebach* and *Prescott* cases involved goods which the assignee allowed to remain in the carrier station-warehouse for his own convenience after arrival, this was not so in the *Western Transit* case. In that case the contract of shipment provided that the carrier would store the goods in transit for 4 months free of charge, and after that for a stated sum (242 U. S., at 451). Although the financial arrangement differs, such storage in transit is not materially different from that performed by Duquesne in its East Liberty warehouse. In the *Detilebach* case the Court pointed out (239 U. S., at 594) that from the inclusion within the Hepburn Act (now Interstate Commerce Act, Section 1 (3)) of "services in connection with * * * storage * * * of property transported"

> it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included to-

> gether under the single term "transportation" and subjected to the provisions of the Act respecting reasonable rates and the like.

The Interstate Commerce Commission has often held that storage in transit constitutes transportation under the Interstate Commerce Act. In *Storage at New London & Thamesville, Conn.*, 190 I. C. C. 213, 214, the Commission declared that

> It is well settled that storage in transit comes within the meaning of the term "transportation" as defined in section 1 of the interstate commerce act.

In the companion case of *Storage in Transit at New Haven, Conn.*, 190 I. C. C. 209, 210, the Commission stated

> Storage accorded goods at a point intermediate between the point of origin and final destination of the goods is not a necessary transportation service but it is a transportation service for which a carrier may publish charges in its tariff if the privilege is accorded to all shippers without discrimination. See *Wharfage Handling and Storage Charges*, 59 I. C. C. 488, *Amer. Warehousemen's Assn.* v. *Inland Waterways Corp.*, 188 I. C. C. 13, *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588, and *Southern Ry.* v. *Prescott*, 240 U. S. 632.

That the definition of "transportation" in Section 1 (3) includes not only the ordinary common carrier obligations of a rail carrier, but also storage

in transit which the carrier chooses to perform was clearly stated by the Commission in *American Warehousemen's Association* v. *Inland Waterways Corporation*, 188 I. C. C. 13, where the Commission said (p. 15):

> It is true that there are certain services, such as warehousing, which, on the theory of the common law, are not common-carrier services and which, in the absence of discrimination, common carriers can not be required to render. Thus in numerous cases we have held that beyond such time as may be required to afford shippers a reasonable opportunity to remove shipments tendered for delivery, storage is no part of the duty of a common carrier; that a carrier is justified, therefore, in imposing such charges for storage as would promote removal of freight from its equipment or premises; and that to that end, it may properly make such charges higher than the actual value of the storage service. *Dakota Monument Co.* v. *Director General*, 59 I. C. C. 101; *Plymouth Coal Co.* v. *D., L. & W. R. R. Co.*, 36 I. C. C. 76.
>
> It is well recognized, however, that there are many things which a carrier may voluntarily do which it can not be required to do, and if it holds itself out to and does render storage service in connection with shipments subject to our jurisdiction such service, although not a service which it could be required to perform, is neverthe-

less included in the term "transportation" as defined by the interstate commerce act. Thus, in *American Paper & Pulp Assoc.* v. *B. & O. R. Co.*, 41 I. C. C. 506, 511, we said:

"In order to prevent overcharges and discriminations under the pretext of additional services, Congress enacted in section 1 that the entire body of such services, many of them, according to the theory of the common law, separable from the carrier's service as carrier, should be included within the single term 'transportation' and be subject to the provisions of the act respecting reasonable rates and the like. And by section 6 no carrier may extend 'any privileges or facilities,' save as these have been duly specified."

This conclusion is supported by decisions of the Supreme Court in *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588 and *Southern Ry.* v. *Prescott*, 240 U. S. 632, in which it was held in substance that "transportation" as defined in the act includes the service of a carrier as warehouseman in connection with an interstate shipment, although its liability for damage while the goods were warehoused might be for negligence only. As the storage service here under consideration is a facility accorded by the barge line in connection with through barge-rail transportation subject to the act it is included within the term "transportation" as defined by the act.

More recently, and after its decision in the *New York Warehousing* cases to be discussed, the Commission referred to goods stored in transit for as long as two years as "in course of suspended through interstate transportation." *Storage of Cocoa Beans in New York District*, 231 I. C. C. 575, 577.

In other cases the Commission has stated that only storage incidental to transportation came within the definition in Section 1 (3) of the Commerce Act. *Guaranty Claim of the Central Elevator and Warehouse Co.*, 72 I. C. C. 169; *Propriety of Operating Practices—New York Warehousing*, 198 I. C. C. 134, 194–196; 216 I. C. C. 291, 348–349, 220 I. C. C. 102, 103, order upheld *sub nom. Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507. The latter case dealt with a claim that "in transit" warehousing was transportation. The Commission held that the alleged transit services in the particular case, even though so described in the carriers' filed tariffs, "did not invest this storage with the characteristics of storage in transit" (216 I. C. C., at 350), inasmuch as the goods were being held either for further shipment or for sale. "*Bona fide* transit arrangements" were expressly not condemned (*id.*, at 349). The statement by this Court approving the Commission's conclusion that "the in-transit warehousing was not a part of transpor-

tation" (305 U. S., at 525) was, of course, based on the Commission's finding, and must be read as related to the practices claimed by the appellant carriers to be "in transit" warehousing, and not to all *bona fide* transit arrangements.

We have not reviewed these authorities for the purpose of proving that they clearly establish that storage of goods carried by rail is "transportation" within Section 1 (3) of the Interstate Commerce Act, although we think that *bona fide* storage in transit is generally so recognized. But if this be regarded as debatable, we do believe that the authorities cannot be said to establish the incorrectness of, or the lack of rational basis for, the Retirement Board's determination. Certainly the Board's conclusion as to the storage in transit performed by Duquesne can not be regarded as without a rational foundation in the light of the cases discussed, and a substantial percentage of Duquesne's storage operations fall in that category (R. 24).

The authorities indicate that the Interstate Commerce Commission and this Court have properly not been concerned with the formulation of any over-all definition of "transportation" but only with resolving particular problems as they arose. Possibly for some purposes, as in the *Western Transit* case, storage in transit may reasonably be held to be "transportation", while a

different result is reached in other situations when questions of preference are to be resolved. See pp. 42–45, *supra*. Here, if the Interstate Commerce Act definition be assumed to control, the Board must apply this *ad hoc* method of interpreting "transportation" to an entirely different law, or series of laws, which are not designed to regulate the relations between carriers and shippers but those between carriers and certain of their subsidiaries and employees. The object of the definition in these statutes was to reach employees of railroad subsidiaries whose services are so closely related to those which a railroad itself may perform as to justify bringing them within railroad labor legislation. Although the authorities may not have been uniform, they certainly provide a reasonable basis for the Board's conclusion that at least a substantial part of Duquesne's activities would have constituted transportation if undertaken by Pennsylvania directly. This being so, the carrier affiliate clause in the Retirement Act and related statutes warrants the Board in holding that Duquesne comes within the statutory definition.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals for the Second Circuit in No. 35 should

be reversed and the judgment of the Court of Appeals for the District of Columbia in No. 103 affirmed.

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OCTOBER 1945.

APPENDIX A

The pertinent provisions of the Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U. S. C. Sec. 228a *et seq* are as follows:

DEFINITIONS

SECTION 1. For the purposes of this Act—

(a) The term "employer" means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive

power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

(b) The term "employee" means (1) any individual in the service of one or more employers for compensation, (2) any individual who is in the employment relation to one or more employers, and (3) an employee representative.

* * * * *

(m) The term "carrier" means an express company, sleeping-car company, or

carrier by railroad, subject to part I of the Interstate Commerce Act.

* * * * *

DUTIES

SEC. 10. (b) 1. The Board shall have and exercise all the duties and powers necessary to administer this Act and the Railroad Retirement Act of 1935. The Board shall take such steps as may be necessary to enforce such Acts and make awards and certify payments. Decisions by the Board upon issues of law and fact relating to pensions, annuities, or death benefits shall not be subject to review by any other administrative or accounting officer, agent, or employee of the United States.

* * * * *

4. The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of such Acts, * * *

* * * * *

COURT JURISDICTION

SEC. 11. An employee or other person aggrieved may apply to the district court of any district wherein the Board may have established an office or to the District Court of the United States for the District of Columbia to compel the Board (1) to set aside an action or decision of the Board claimed to be in violation of a legal right of the applicant or (2) to take action or to make a decision necessary for the enforcement of a legal right of the applicant. Such court shall have jurisdiction to entertain such application and to grant appropriate

relief. The decision of the Board with respect to an annuity, pension, or death benefit shall not be subject to review by any court unless suit is commenced within one year after the decision shall have been entered upon the records of the Board and communicated to the person claiming the annuity, pension, or death benefit. The jurisdiction herein specifically conferred upon the Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by such courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act or the Railroad Retirement Act of 1935.

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APPENDIX B

The pertinent provisions of the Railroad Unemployment Insurance Act, 1938, 52 Stat. 1094, as amended, 45 U. S. C. Sec. 351 *et seq* are as follows:

DEFINITIONS

SECTION 1. For the purposes of this Act, except when used in amending the provisions of other Acts—

(a) The term "employer" means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the gen-

eral steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies, and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

(b) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

(c) The term "company" includes corporations, associations, and joint-stock companies.

(d) The term "employee" (except when used in phrases establishing a different meaning) means any individual who is or has been (i) in the service of one or more employers for compensation, or (ii) an employee representative. The term "employee" shall include an employee of a local lodge or division defined as an employer in section 1 (a) only if he was in the service of a carrier on or after August 29, 1935. The term "employee" includes an officer of an employer.

* * * * *

CLAIMS FOR BENEFITS

SEC. 5. (a) Claims for benefits and appeals from determinations with respect thereto shall be made in accordance with such regulations as the Board shall prescribe. Each employer shall post and maintain, in places readily accessible to employees in his service, such printed statements concerning such regulations as the Board supplies to him for such purpose, and shall keep available to his employees copies of such printed statements. Such printed statements shall be supplied by the Board to each employer without cost to him.

(b) The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such

procedures as it may deem necessary or proper for the determination of a right to benefits.

(c) * * *

In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this Act but which does not comply with the provisions of this Act and denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the proceedings provided for in this paragraph and for decisions upon such proceedings.

Final decision of the Board in the cases provided for in the preceding two paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party notified, as hereinabove provided, of his right to participate in the proceedings may obtain a review of any such decision by which he claims to be aggrieved or the determination of any issue

therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish the rights and obligations, arising under this Act, of every party notified as hereinabove provided of his right to participate in the proceedings.

* * * * *

(f) Any claimant, and any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which such claimant is a member, may, only after all administrative remedies within the Board have been availed of and exhausted, obtain a review of any final decision of the Board with reference to a claim for benefits by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant, or within such further time as the Board may allow, in the United States district court for the judicial district in which the claimant resides, or in the United States District Court for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within fifteen days after receipt of service, or within such additional time as the court may allow, the Board shall certify and file with the court in which such petition has

been filed a transcript of the record upon which the findings and decision complained of are based. Upon such filing the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise entitled by law to precedence. It shall have power to enter upon the pleadings and transcript of the record a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the Court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court a transcript of the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

* * * * *

APPENDIX C

Section 1, First of the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. sec. 151, First, insofar as here pertinent reads as follows:

> SECTION 1. When used in this Act and for the purposes of this Act—
>
> First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": * * *

APPENDIX D

The pertinent provisions of the Interstate Commerce Act, 49 U. S. C. sec. 1 *et seq.* read as follows:

SEC. 1 (3) (a). The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person"

as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

* * * * * *

SEC. 1 (5) (a). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * * *

SEC. 6 (7). No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * * * *

SEC. 15 (13). If the owner of property transported under this part directly or in-

directly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

APPENDIX E

Position of the Social Security Board

The Social Security Board has submitted the following to the Solicitor General as a statement of its position:

The Social Security Board has not concurred in the views of the Railroad Retirement Board regarding the coverage of railroad subsidiaries. It has paid, and is currently paying, benefits based on services for at least forty railroad subsidiaries which the Railroad Retirement Board has held to be covered by the railroad legislation; though expedients have been worked out to avoid duplicate payments in any individual case. The difference of opinion has significance particularly in connection with monthly survivorship benefits, which are payable under the Social Security Act but are not payable under the Railroad Retirement Act. The Social Security Board is paying survivors' benefits based on service falling in this disputed area, while the Railroad Retirement Board is paying retirement benefits (which are normally larger) to workers who reach retirement age.

The Social Security Board takes the position, on the basis of the legislative history of the coverage definition, that Congress intended to confine the railroad legislation to the railroad industry, and not to extend it to segments of other industries, such as water or motor transportation, by reason of the ownership of the stock of companies

engaged in such activities. That Board believes that the basic intention in framing the coverage definition in the Railway Labor Act amendments of 1934 was to paraphrase the definition of "transportation" in section 1 (3) of the Interstate Commerce Act; and that the only reason for departing in this respect from the original draft, which had in terms referred to the Commerce Act definition, was the objection by the chairman of the Senate committee to a technique of draftsmanship which required reference to another act. (Senate Hearings on S. 3266, 73d Cong., 2d Sess., pp. 10–11, 145–6.) The Social Security Board has recognized that this interpretation cannot be applied rigidly in all cases, and has not applied it in the few instances that have come before that Board in which a railroad company has turned over to a subsidiary a part of the normal railroad operation, such as maintenance of equipment. Its position is that the Congressional intention to cover these occasional cases does not outweigh the evidence that the general rule to be applied in other situations was meant to be that of the Interstate Commerce Act definition.

With respect to the coverage of railroad subsidiaries engaged in the warehousing business, the Social Security Board has assumed that the term "transportation" in the Interstate Commerce Act applies only to those services which the carrier is required by law to perform or which it holds itself out to perform under a railroad tariff. The Social Security Board concedes, however, that if Duquesne's operations are found to constitute such "transportation" services the company is covered by the railroad legislation.

The Social Security Board believes that the criterion of coverage adopted by the Railroad Retirement Board is too indefinite to admit of practical and consistent administration by the many agencies operating the interlocking social insurance systems. It also believes that, at least as applied by the Railroad Retirement Board in the past, that criterion has led to extensions of the railroad legislation into fields—most conspicuously those of water and motor transportation and coal mining—which are not in a proper sense a part of the railroad industry, and to which Congress did not intend the legislation to apply. That Board has, therefore, refused to deny benefits in such cases.

The Social Security Board's interpretation of the act is the same as that adopted by the Circuit Court of Appeals for the Fifth Circuit in *Ocean Steamship Company of Savannah* v. *Allen*, 123 F. (2d) 469, the Circuit Court of Appeals for the Fourth Circuit in *Walling* v. *Baltimore Steam Packet Company*, 144 F. (2d) 130, the majority of the Court below in number 95, reported at 148 F. (2d) 473, and the Federal District Court for the District of Nebraska in *Interstate Transit Lines* v. *United States*, 56 Fed. Supp. 332.

The Social Security Board calls attention to the fact that its decisions are entitled, upon judicial review, to as great a measure of finality as are those of the Railroad Retirement Board. (See Social Security Act, as amended, sec. 205 (g); 42 U. S. C., sec. 405 (g)).